(5)

No. 87-2098

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JAMES H. BURNLEY, IV
SECRETARY OF TRANSPORTATION,

Appellant

v.

MID-AMERICA PIPELINE COMPANY,

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

BRIEF OF FLORIDA POWER & LIGHT COMPANY, et al. AS AMICI CURIAE IN SUPPORT OF APPELLEE

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Amici Curiae Florida Power & Light Company, et al.[1] submit this brief in support of Appellee Mid-America Pipeline Company, respectfully urging this Court to affirm the decision in *Mid-America Pipeline Company v. Dole*, No. 86-C-815E, slip op. (N.D. Okla. August 5, 1987). All parties have consented in writing to the filing of this brief, and copies of the consents have been filed with the Clerk.

[1] In addition to Florida Power & Light Company, *amici* include Arkansas Power & Light Company, Baltimore Gas and Electric Company, Consolidated Edison Company of New York, Inc., Consumers Power Com-

(Footnote continued on following page)

INTEREST OF AMICI CURIAE

Amici Florida Power & Light Company, et al. are 29 electric utilities owning or operating nuclear power plants across the United States. The interest of *amici* in this matter arises from the fact that the Nuclear Regulatory Commission ("NRC") imposes very substantial annual charges on each of the nuclear power plants operated by *amici* and other utilities.[2] These charges raise many of the same issues as the Department of Transportation ("DOT") "fees" at issue in *Mid-America Pipeline*. The fee-setting authority claimed by the NRC is at least as open-ended and discretionary as the fee-setting power of DOT challenged in *Mid-America Pipeline*, and, therefore, raises the concerns about delegation of the taxing power expressed by this Court in *National Cable Television Association v. United States*, 415 U.S. 336 (1974).

In *Florida Power & Light Company v. United States*, 846 F.2d 765 (D.C. Cir. 1988), the utilities sought to invalidate the NRC charges on the grounds that (i) Section 7601 does not authorize the broad based fees imposed by the NRC,[3] or (ii) if

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pany, Duquesne Light Company, Georgia Power Company, Houston Lighting and Power Company, Illinois Power Company, Indiana Michigan Power Company, Iowa Electric Light and Power Company, Kansas City Power & Light Company, Kansas Electric Power Cooperative, Inc., Kansas Gas and Electric Company, Louisiana Power & Light Company, Northern States Power Company, Pacific Gas and Electric Company, Pennsylvania Power & Light Company, Power Authority of the State of New York, Southern California Edison Company, System Energy Resources, Inc., The Cleveland Electric Illuminating Company, The Toledo Edison Company, TU Electric, Union Electric Company, Washington Public Power Supply System, Wisconsin Electric Power Company, Wolf Creek Nuclear Operating Corporation, and the Yankee Atomic Electric Company.

[2] The charges are imposed by regulations (10 C.F.R. Part 170 (1988)) purportedly issued pursuant to Section 7601 of the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"), 42 U.S.C. § 2213. For fiscal year 1988 these fees totaled $124 million.

[3] The utilities contend that under the principles of statutory interpretation followed in *National Cable* and subsequent cases, Section 7601 of COBRA cannot be interpreted as authorizing the particular fees the NRC has imposed on the utilities.

the charges are consistent with Section 7601, then the Section unconstitutionally delegates the power to tax to the NRC. The District of Columbia Circuit, in a 2-1 decision, upheld the NRC charges, and a petition by the utilities for a writ of certiorari to review that decision is presently pending before this Court. *Florida Power & Light Company v. United States*, No. 88-234 (August 10, 1988).

SUMMARY OF ARGUMENT

Besides the statute providing for the DOT fees at issue in this case, Section 7005 of COBRA, 49 U.S.C. App. § 1682a, Congress has recently adopted other statutes that delegate the power to impose charges to administrative agencies, conferring on the agencies broad discretion to determine both who is to be subject to the charges and how much each shall pay. These charges are intended, moreover, to recover the costs of providing broad benefits to the general public, rather than the costs of specific services individually benefitting each feepayer. The present case should be decided in the context of this broader policy trend.

SECTION 7005 directs DOT to impose annual charges on pipeline operators to finance the cost of Federal pipeline safety programs. As a practical matter, the statutory criteria by which these charges are to be set provide no meaningful constraint on the discretion of DOT to choose who among the pipeline operators shall pay any significant tax and how much each shall pay. Under *National Cable* and its progeny, these charges are clearly taxes and not user fees.

The government's position in this case would leave no effective restriction on delegation of the power to tax. Allowing such open-ended delegations would seriously undermine control over taxation through the democratic process, eliminating the direct accountability of elected officials for the exercise of this critical power. The Framers recognized that the only way to assure that the taxing power is not abused is to require that

those most directly accountable through the democratic process make the decisions regarding taxation. They consequently provided that Congress is to exercise the power to tax through a prescribed process.

SECTION 7005, therefore, should be struck down as an unconstitutional delegation of the power to tax. Moreover, even if delegation of the taxation power is not per se unconstitutional, the standards of Section 7005 are too open-ended to allow this delegation to stand.

ARGUMENT

I. Section 7005 of COBRA is One of Many Recently Enacted Statutes That Delegate the Power to Impose Charges, and this Case Should Be Decided in that Context.

In recent years, Congress has increasingly delegated to administrative agencies the power to impose charges on some or all of the entities under each agency's jurisdiction. These delegations grant the agencies overly broad, open-ended discretion to determine who among their subjects shall pay the charges and how much each shall pay. Furthermore, while these statutory provisions are adopted under the guise of "user fees," the charges are generally assessed to recover the costs of providing broad benefits to the general public, rather than the costs of specific services individually benefitting each feepayer.

A. *The DOT Fees*

SECTION 7005 of COBRA delegates to DOT the power to impose annual charges on pipeline operators to recover the costs of Federal pipeline safety and enforcement programs. The Section confers on DOT the discretion to devise a schedule of such charges "based on the usage [of pipelines], in reasonable relationship to volume-miles, miles, revenues, or an appropriate combination thereof." [4]

[4] DOT chose to impose the charges on the basis of total miles of pipeline operated by each company, primarily because this option was "simple to administer." 51 Fed. Reg. 25,782, 46,978 (1986).

The court below found that this statutory directive provides no significant constraint on the discretion of DOT to structure the fees. Depending on which option or combination of options DOT chooses, the Department can determine who among the pipeline operators shall have to pay the fees and how much each will have to pay, subject only to the limit that total fees must equal the cost of the pipeline program.

For example, the court found that if DOT based the fees solely on pipeline miles, then Mid-America Pipeline Company would have to pay 28.3% of the total funds to be raised. Jurisdictional Statement at 9a. If the fees were based instead on volume-miles, however, then Mid-America's share would be only 5% of total charges. *Id.* And if the fees were based on gross revenues, then Mid-America would pay 12.2% of the total fees. *Id.* Similarly, for another pipeline operator, the Colonial Pipeline Company, the court found that if DOT based the fees on pipeline miles the company would pay 18.5% of the total fees. But if DOT based the fees on volume-miles, Colonial's share would increase to 70.9% of the fees. And if DOT based the fees on gross revenues, then Colonial would pay 49.4%. *Id.* The court concluded that with the statutory authority to choose any combination of these standards, DOT is free to develop fee structures that would result in the assessment on individual companies of almost any amount "from 0-100%" of the total fees. Jurisdictional Statement at 10a. In effect, therefore, DOT has the discretion to determine who among the pipeline operators shall pay any significant fee, and how much each shall pay.

The DOT fees are assessed to recover the costs of Federal pipeline programs that provide broad benefits to the general public concerning safety and other regulatory interests. The fees finance management, overhead and administrative costs of the pipeline programs, the costs of funding a grants-in-aid program for the states, the costs of collecting the charges, and the costs of bringing civil and criminal prosecutions against

pipeline companies. The fees, therefore, do not charge for the cost of specific services individually benefitting each pipeline operator.

B. *The NRC Fees*

These same characteristics are found in other recent statutory provisions as well. For example, under Section 7601 of COBRA, which provides for the NRC fees, the Commission has effectively assumed the discretion to determine who is to be subject to the fees. While the Section states that the fees are to be exacted from NRC "licensees", the NRC has imposed the fees solely on those owning and operating nuclear power reactors, excluding all other Commission licensees.[5] But given the statutory mandate to impose fees on NRC "licensees," the Commission could just as arbitrarily decide later to apply the fees to any of the licensees currently exempted, or to exempt any of those currently assessed. Indeed, the proposed rule providing for the fees published by the NRC for comment would have included major materials licensees among those charged (51 Fed. Reg. 24,082 (1986)), but the final rule excluded those licensees without explanation (10 C.F.R. Part 170 (1988)).

Moreover, as to the amount of the fees, Section 7601 guides the NRC with only vague, open-ended criteria, *i.e.*, that the fees "shall be reasonably related to the regulatory service provided" and "fairly reflect the cost to the Commission of providing such service." These criteria, applied without reference to the *National Cable* standards, have proved to be meaningless. *See Florida Power & Light Company v. United States*, No. 88-234, Petition for Writ of Certiorari at 17. Indeed, Section 7601 does not even fix the total amount of fees to be recovered. It merely establishes a ceiling of 33% of the total NRC budget less other fees collected by the agency.[6]

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[5] Excluded entirely from the NRC annual charges are major nuclear materials licensees (including large uranium processing operations), nuclear power related vendors, small materials licensees, and research reactor licensees, which in terms of numbers represent a majority of NRC licensees.

[6] That ceiling was changed to a floor of 45% under Section 5601 of the Omnibus Budget Reconciliation Act of 1987, 42 U.S.C. § 2213.

Once again, therefore, the Section delegates the power to determine both who shall be subject to the fees and how much each shall pay.

In addition, the NRC fees, like the DOT fees, also charge for programs and activities serving broad interests of the general public, such as public health and safety. They are imposed to recover the general costs of regulation or of activities supporting regulation. Indeed, most of the funds raised finance research that the NRC has described as "promot[ing] a rise in the general level of knowledge." *Id.* at 4. Moreover, instead of calculating the fees on the basis of costs for specific services for each utility, the NRC imposed a uniform, per capita fee.[7]

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[7] There are, of course, differences in detail among the statutes, which raise different aspects of the fee delegation question. For example, the utility licensees in *Florida Power & Light* contend that Section 7601 cannot be interpreted as authorizing the particular fees imposed by the NRC. Reflecting concern over the constitutional validity of delegations of the power to tax, this Court in *National Cable* adopted a rule of interpretation that applies to all fee delegation statutes — absent language expressly delegating the power to impose taxes unrelated to benefits received, the fees can charge each beneficiary only for the costs of specific services providing discrete benefits to that beneficiary. Because Section 7601 contains no more of a clear and express statement delegating the power to tax than does the statute interpreted in *National Cable* — the Independent Offices Appropriation Act of 1952 (31 U.S.C. § 9701) — Section 7601 must be implemented in accordance with the *National Cable* standards. Since the NRC fees do not comply with these standards, they should be struck down.

Although the courts have not frequently found statutes unconstitutional on delegation grounds, they have more often in recent years relied on delegation concerns to narrowly interpret statutes, as in *National Cable* and as requested in *Florida Power & Light*. *See, e.g.*, Industrial Union Department v. American Petroleum Institute, 448 U.S. 607 (1980). *See also*, Synar v. United States, 626 F. Supp. 1374, 1384 (D.D.C.) (per curiam) ("The Court has continued to use the [delegation] doctrine, however, in an interpretative mode, finding that statutory texts conferring power on the executive should be construed narrowly where broad construction might represent an unconstitutional delegation"), *aff'd on other grounds sub. nom.* Bowsher v. Synar, 478 U.S. 714, 106 S.Ct. 3187 (1986); DeBartolo Corp. v. Florida Gulf Coast Building & Const. Trades Council, U.S. , 108 S.Ct. 1392, 1397 (1988) (Court will construe statutes to avoid constitutional problems, unless such construction is plainly contrary to the intent of Congress).

C. *The FERC Fees.*

Another statute, Section 3401 of the Omnibus Budget Reconciliation Act of 1986, 42 U.S.C. § 7178, grants to the Federal Energy Regulatory Commission ("FERC") the power to impose charges to recover the costs of all of its programs and activities.[8] This Section grants FERC complete discretion to determine who among those it regulates shall be subject to the fees. Moreover, FERC is to determine the amount of the fee on the basis of any "methods that the Commission determines by rule to be fair and equitable." Section 3401(b). Therefore, like the DOT and NRC fee statutes, Section 3401 delegates to FERC the power to determine who is to be subject to the fees and how much each is to pay. The fees, moreover, charge for the broad benefits to the public provided by the agency, rather than solely for specific benefits provided individually to the feepayers.[9]

The present case should be decided in the context of this broader policy trend. The DOT fees are but one example of a growing number of fee-setting delegations. The combined impact of these delegations dilutes democratic accountability and control over the taxation power. Moreover, reversal of the decision below may be taken as approving a wide range of possible fee delegations, and may be seen by Congress as

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[8] The FERC fees are under challenge in Interstate Natural Gas Ass'n of America v. FERC, Nos. 87-1570, et al. (D.C. Cir. filed Oct. 9, 1987) and Mid-America Pipeline Co. v. FERC, No. 87-C-571E (N.D. Okla. filed July 20, 1987).

[9] In other recently enacted fee statutes, Congress has shown that it can specifically instruct an agency both whom to assess and how much, setting out detailed fee schedules right in the statute. Section 5002 of COBRA, 47 U.S.C. §§ 156, 158 (providing for fees to be charged by the Federal Communications Commission); Section 13031 of COBRA, 19 U.S.C. § 58a (providing for fees to be charged by the U.S. Customs Service). In Section 10511 of the Omnibus Budget Reconciliation Act of 1987, 26 U.S.C. § 7801, Congress specified the average fees to be charged by the Secretary of the Treasury to recover certain costs of the Internal Revenue Service, with fees to vary only by the amount of work necessary to fulfill requests by feepayers specifically identified in the statute.

authorizing even more open-ended delegations of taxation power in the future.

II. Section 7005 Unconstitutionally Delegates the Power to Impose Arbitrary, Open-Ended Taxes.

This Court clearly articulated the distinction between a fee and a tax in *National Cable*. In that case, the Court held that fees can be charged only for specific services that provide benefits individually to the feepayer, benefits "not shared by other members of society." 415 U.S. at 340-341. The amount of the fees must reflect no more than the costs of providing such services. Taxes, by contrast, arbitrarily impose charges by any chosen principle to finance services that benefit the public at large. The Court elaborated, saying

> Taxation is a legislative function, and Congress, which is the sole organ for levying taxes, may act arbitrarily and disregard benefits bestowed by the Government on a taxpayer and go solely on ability to pay, based on property or income. 415 U.S. at 340-341.[10]

As discussed, *supra*, at 5-6, the DOT fees imposed under Section 7005 do not charge for specific services individually benefitting each feepayer. Rather, the fees finance Federal pipeline programs that provide broad benefits to the general public. These benefits are analogous to the public benefits of

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[10] This Court further elaborated on these principles in Federal Power Commission v. New England Power Company, 415 U.S. 345, 349-350 (1974), saying "no charges should be made for services rendered when the identification of the ultimate beneficiary is obscure and the services can be primarily considered as benefitting broadly the general public." *See also* National Cable Television Association v. FCC, 554 F.2d 1094 (D.C. Cir. 1976); Electronic Industries Association v. FCC, 554 F.2d 1109 (D.C. Cir 1976); National Association of Broadcasters v. FCC, 554 F.2d 1118 (D.C. Cir. 1976); Capital Cities Communications, Inc. v. FCC, 554 F.2d 1135 (D.C. Cir. 1976); Brock v. Washington Metropolitan Area Transit Authority, 796 F.2d 481 (D.C. Cir. 1986), *cert. denied*, 107 S.Ct. 1887 (1987); *In re* Jenny Lynn Mining Co., 780 F.2d 585 (6th Cir.), *cert. denied*, 106 S.Ct. 3276 (1986); Nevada Power Co. v. Watt, 711 F.2d 913 (10th Cir. 1983); City of Vanceburg, v. FERC, 571 F.2d 630 (D.C. Cir. 1977), *cert. denied*, 439 U.S. 818 (1978).

the FCC regulations financed by the fees struck down in *National Cable*, as are the benefits from the regulatory programs financed by the NRC fees under Section 7601 and by the FERC fees under Section 7005. Indeed, as with these other statutory provisions, the activities financed by the DOT fees (*see, supra*, at 5-6) all provide independent public benefits. That is because the DOT fees support activities undertaken by DOT "on its own instigation in support of a general agency program expected to have a significant benefit both for the public and for private recipients as yet unidentified." *Mississippi Power and Light Co. v. NRC*, 601 F.2d 223, 231 n. 17 (5th Cir. 1979), *cert. denied*, 444 U.S. 1102 (1980). Based on *National Cable* and subsequent cases, the court in *Mississippi Power* held that such independent public benefits cannot be recovered by delegated fees. Ignoring these principles, the DOT charges arbitrarily assess the pipeline operators for these public benefits, and impose the fees based on property (miles or volume-miles of pipeline) or income (pipeline revenues). Under *National Cable* and its progeny, therefore, the DOT charges are taxes rather than user fees.

Indeed, as discussed, *supra*, at 4-5, Section 7005 delegates to DOT the discretion to determine who among pipeline operators shall be subject to any significant tax and how much each shall pay. As the decision below states,

> Here, the amount of the "fee" to be imposed upon each "user" under § 7005 was left to the discretion of the Secretary. This statute asks more from the Secretary than aid in implementing a tax established by the legislature; it asks the Secretary of Transportation to use her discretion and *set* the rate of fees which is in fact a tax, and then go one step further and collect such tax.

Jurisdictional Statement at 10a. In other words, DOT's discretion in establishing the fees involves much more than merely issuing subordinate rules to facilitate and implement a well-defined Congressional policy. Rather, Congress has delegated

to the Department the authority to come up with "some reasonably equitable formula for spelling out each pipeline's portion of those total costs . . ." H.R. Rep. No. 300, 99th Cong., 1st Sess. 497 (1985).

The government argues that such delegations of the power to tax are not unconstitutional, as long as Congress has announced a general policy, designated the part of the Executive Branch that is to implement that policy, and set out the boundaries of the Executive's authority. Brief for the Appellant at 6. But that legal standard would leave no meaningful limitation on delegations of the power to tax. Under such a standard, Congress could delegate to the Internal Revenue Service the power to raise taxes to balance the budget each year, subject to open-ended guidelines such as "the tax burden assessed on individual taxpayers shall be reasonably related to ability to pay" or "the agency shall take into account likely impacts on the economy" or "the tax shall be assessed based on the taxpayer's income, property or consumption, or an appropriate combination thereof."

Allowing such delegations of the power to impose taxes would seriously undermine control over taxation through the democratic process. It would remove the direct accountability of elected officials for the exercise of the taxing power vested in them alone under the Constitution. U.S. Const., Art I, § 8, cl.1. In providing that all tax bills shall originate in the House of Representatives (U.S. Const., Art. I, § 7, cl.1), the body closest to the people where representatives are elected every two years, the Framers' intent was to maintain democratic accountability and control over the power to tax. Farrand, *The Records of the Fede. l Convention of 1787* 233 (1889) (Record of the debates at the Constitutional Convention shows that the reason for requiring tax bills to originate in the House was that "The [House] was more immediately the representatives of the people, and it was a maxim that the people ought to

hold the purse strings"). The Framers recognized that the only way to assure that the taxing power is not abused is to require that those most directly accountable through the democratic process make the decisions regarding taxation.[11] Indeed, they contemplated that the taxation power would be exercised by Congress and not delegated, as reflected in the constitutional provision specifically requiring that revenue-raising bills originate in the House of Representatives. *Id.* These provisions are violated when a statute delegates to an unelected bureacracy the determination of who is to be taxed and how much[12]

For these reasons, numerous cases and commentators agree that Congress cannot constitutionally delegate the power to impose taxes. *National Cable*, 415 U.S. at 340 ("Congress . . . is the sole organ for levying taxes . . . ."); *Central & S. Motor Freight Tariff Ass'n v. United States*, 777 F.2d 722, 725 (D.C. Cir. 1985) (charges beyond the recovery of benefits conferred upon "identifiable beneficiaries" are more "conceptually akin to taxes which could, of course, be levied only by Congress"); *Sohio Transportation Co. v. United States*, 766 F.2d 499, 503 (Fed. Cir. 1985) (the recovery of an agency's "expenditures for the public interest" through the collection of fees "would constitute an unconstitutional delegation of Congress' exclusive power to tax"); *New England Power Co. v. U.S. Nuclear Regulatory Comm'n*, 683 F.2d 12, 14 (1st Cir. 1982) (*National Cable* made clear that "taxes . . . may only be levied

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[11] *See, e.g.*, The Federalist No. 10 (Hamilton); The Federalist No. 48 (Madison); 5 Elliot, Debates on the Adoption of the Federal Constitution in the Convention Held at Philadelphia in 1787, 284 (2nd ed. 1887) (Franklin); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 376, 428 (1819); Freedman, Crisis and Legitimacy: The Administrative Process and American Government 85-88 (1978); Freedman, Delegation of Power and Institutional Competence, 43 U.Chi.L.Rev. 307, 326 (1976).

[12] Allowing the taxation power to be delegated to an agency to fund its own programs tends to remove constraints and controls over government spending as well. The agency no longer faces the same burden as before in justifying its revenue demands before Congress, and therefore has less of an incentive to control costs. In addition, because the agency is no longer a burden on general revenues, Congress is likely to become less vigilant in monitoring the agency's spending.

by Congress"); *Mississippi Power & Light Co.*, 601 F.2d at 227 (affirms "the constitutional mandate that only Congress has the 'power to levy and collect taxes' "); Tribe, *American Constitutional Law* § 5-17, at 366, n.15 (2d ed. 1988) ("Therefore, it seems likely that the taxation power if it is to be exercised legitimately, may be exercised only by Congress itself"); Freedman, *Crisis and Legitimacy*, *supra*, n.11, at 88 ("Because no other institution of the Federal government except Congress possesses the unique characteristics that the framers relied upon to provide citizens with an institutional security against unfair or oppressive taxation, no mere delegate of Congress could aspire to exercise the power to tax in a manner qualitatively similar to Congress").

In the instant case, the government argues that the language of the Constitution does not distinguish between Article I powers, and therefore one power cannot be any more or less delegable than another. Brief for Appellant at 10-21. But, as Professor Freedman points out, certain congressional powers, in particular taxation and impeachment, are inherently non-delegable:

> When a constitutionally assigned power is by its nature pecularily resistant to the formulation of governing principles and standards, the indications become strong that the Framers placed a deep reliance for its proper exercise upon the unique qualities—the institutional competence—of the body to which it was assigned.
>
> . . . .
>
> The power of Congress to levy taxes and impeach the President are of this character.

Freedman, *Crisis and Legitimacy*, *supra*, n.11 at 88; *see also* Tribe, *supra*, p. 13 at 362 ("certain congressional powers are simply not delegable—as when it is clear from the language of the Constitution that the purposes underlying certain powers

would not be served if Congress delegated its responsibility"). Indeed, where the Framers provided a specific procedure in the Constitution for the Congress to follow in exercising a power, as with taxation, that in itself indicates that they intended that the power not be delegated and thereby exercised by a different procedure.[13]

Even if delegation of the taxing power is not per se unconstitutional, such delegations should at least be subject to stricter requirements then other delegations, based on the concerns discussed above. *See* Note, *The Assessment of Fees by Federal Agencies for Services to Individuals*, 94 Harv. L. Rev. 439, 443 (1980) (even if the taxing power is delegable in certain circumstances, the legislature must provide "standards more specific than normally are required to guide the exercise of agency discretion"); *Synar v. United States*, 626 F. Supp. at 1385-86 (D.D.C.) (per curiam) (constitutionality of a delegation depends upon "the scope of the power ... *plus* the specificity of the standards governing its exercise"), *cf. Florida Power & Light Co. v. U.S.* The government argues that no such stricter standard for tax delegations can be imagined or articulated. Brief for Appellant at 19. But the obvious, principled standard that comes to mind is that charges that do not meet the *National Cable* standards cannot be delegated, or at least that the authority to determine who is to be subject to the taxes and how much each is to pay over a broad range cannot be delegated.

Indeed, the delegation of discretion to choose who must pay and how much should be found impermissible even under the usual delegation standards. The delegation doctrine is an

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[13] Congress, of course, can delegate to the IRS the power to administer, enforce and implement the tax laws, through the adoption of rules and regulations if necessary. *See, e.g.*, IRS § 7805, empowering the Secretary of the Treasury to adopt "all needful rules and regulations for the enforcement of this title ...." But Congress has not and cannot delegate to the IRS the power to determine who is to be subject to the tax and how much each taxpayer is to pay. *See* Manhattan General Equipment Co. v. C.I.R., 297 U.S. 129, 134 (1936).

important safeguard in the protection of our nation's liberties and democratic system of government.[14] But if the doctrine is to fulfill this critical role, delegations in general can be found to satisfy constitutional requirements only when Congress provides substantive standards clearly circumscribing the delegated power. Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 Mich. L. Rev. 1223 (1984); Aranson, Gellhorn and Robinson, *A Theory of Legislative Delegation*, 68 Cornell L. Rev. 1 (1981); Ely, *Democracy and Distrust, A Theory of Judicial Review* 131-134 (1980), Freedman, *Crisis and Legitmacy*, *supra*, n.11, at 78-94; Tribe, *supra*, p. 13, § 5-17, at 362-369. In Section 7005, and in the other agency fee statues discussed here, Congress has failed to do so.

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[14] The government emphasizes that, since the 1935 decisions in Schechter Poultry Co. v. United States, 295 U.S. 495 (1935) and Panama Refining Co. v. Ryan, 293 U.S. 388 (1935), this "Court has repeatedly and uniformly upheld statutes challenged on non-delegation grounds." Brief for the Appellant at 9. But that cannot be taken to mean the doctrine has lost its vitality. *See Industrial Union Department v. American Petroleum Institute*, 448 U.S. at 685 (Rehnquist, J., concurring) reemphasizing the continuing importance of the delegation doctrine, and admonishing that

> We ought not to shy away from our judicial duty to invalidate unconstitutional delegations of legislative authority solely out of concern that we should thereby reinvigorate discredited constitutional doctrines of the pre-New Deal era.

CONCLUSION

For the reasons stated, the decision of the court below should be affirmed.

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